IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 130 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHYAMLAL MARKETING PVT.LTD.

Versus

ALLONS PHARMACEUTICALS LTD.

Appearance:

1. COMPANY PETITION No. 130 of 1999

MR SA DESAI for Petitioner No. 1

MR MUKESH A PATEL for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 13/01/2005

ORAL JUDGEMENT

1. The petitioner has filed this petition under sec. 433(1)(e) read with sec. 434 of the Companies Act, 1956.

2. It is the case of the petitioner that as per the agreement between the parties, the respondent was to reimburse the petitioner company for expenses incurred by it. The petitioner company incurred expenses for registration before the trade tax authority, the details whereof were sent to the respondent company. However, the said amount was not paid to the petitioner company. As per the agreement between the parties, 16% interest was payable on the security deposit to the petitioner-company by the respondent-company. Such interest was paid only upto 31.3.1998. The interest from 1.4.1998 is still due, which comes to Rs. 96,000/- up to 31.3.1999 with further interest. It is also the case of the petitioner that the loss by way of commission was also not paid by the respondent-company to the petitioner-company and the amount claimed by the petitioner company under the head of commission expenses and interest on the security deposit comes to Rs. 2,52,817-50ps with further interest thereon.

3. Despite several remainder letters, the respondent-company has not made payment to the petitioner-company, and hence, the petitioner - company issued statutory notice through its advocate on 31.12.1998 and made demands of outstanding dues. Since the dues are not paid, the petitioner - company has filed the present petition before this court on the ground that the respondent company has lost its financial substratum and it has failed to discharge its liability towards its creditors.

4. After issuance of notice, the respondent company has filed its appearance and in the affidavit in reply, three main contentions were raised. Firstly, there are disputed questions of facts which cannot be entertained by this court in winding up petition. Secondly, as per the agreement, there is a clause for referring the dispute to the Arbitrator, and instead of referring the dispute to the Arbitrator, the present petition is filed which could not have been entertained by this court. The claim of the petitioner is disputed and it was not an admitted liability and hence, winding up petition should not be entertained by this Court.

5. After considering the pleadings of the parties, this court has admitted the petition on 18.4.2001 and the order of advertisement was also passed on the same day directing the petitioner to advertise the petition in English daily "Indian Express" and Gujarati daily namely "Jansatta" and the publication of the notice in Official Gazette was dispensed with. Pursuant to the order of

publication of notice passed by this court, the petitioner has advertised the notice in English daily "Indian Express" and Gujarati daily "Jansatta" and the service of affidavit was filed on 5.7.2001 along with news papers cutting .

6. After the pleadings are over, the matter is listed for final hearing on several occasions. Some times, it was adjourned on the ground of settlement and some times on the ground of absence of ld. advocate for the respondent-company. The matter is of 1999 and it is listed for 88 times before the court till this date. On 3.9.2004, this court has passed an order observing that settlement was not possible in the matter. The matter was heard to some extent. It appears from the pleadings that there is some defence available to the respondent company, but even in that case, the whole claim of the petitioner company will not be found to be discarded or unacceptable. In this view of the matter, only with a view to test the bona fide of the respondent company, the court directed the respondent-company to deposit a sum of Rs. 50,000/- in this court within two weeks from the date of the said order, failing which appropriate orders will be passed in the matter.

7. Office endorsement shows that no amount has been deposited by the respondent-company. Since the respondent company is represented through ld. advocate Mr. Mukesh Patel, there is no question to serve a writ upon the respondent-company. Neither ld. advocate appearing for the respondent-company is present nor the amount was deposited. It, therefore, appears to the court that the respondent-company is not in a position to discharge its liability towards the petitioner-company. The respondent company has lost its financial substratum and, there is no question of survival of respondent-company. Ld. advocate Mr. Mukesh Patel for the respondent company is not present. Mr. SA Desai ld. advocate for the petitioner company is present and stated that the amount which was claimed by the petitioner was due and payable by the respondent-company and it is based on agreement. There is no question of any dispute. Simply because there is a clause for arbitration, it cannot be said that this court has no jurisdiction to entertain the present petition. With regard to the defence raised in the affidavit in reply about financial soundness of the respondent company, no evidence is led. It is clear that the respondent company is not in a position to discharge its duty.

8. In the above view of the matter, this court is of

the view that it is just and proper to wind up the respondent-company. Accordingly, the respondent-company is ordered to be wound up. The Official Liquidator attached to this court is appointed as the Official Liquidator of the respondent company and he is directed to take charge of all the assets of the respondent company and he is further directed to exercise all powers which are vested in the OL under the Companies Act, 1956. It is, however, made clear that before taking possession of the respondent-company, the OL shall intimate to secured creditors as well as responsible person of the respondent company and in their presence the possession should be taken. Before making inventory of the assets of the respondent company and appointing security agency, the OL should take prior permission of this court. This petition is accordingly allowed. No order as to costs.

(K.A. PUJ, J.)

mandora/